

Other Interesting Facts About the Law of the Sea Treaty

- ▶ Despite the fact that deep seabed mining is not economically viable at this time, already in 1998, the Seabed Authority's budget already is \$4.9 million. It's easy to imagine the price tag when technology advances make deep sea mining an economic reality.
- ▶ To run this bureaucracy, the Seabed Authority already employs 36 individuals in Kingston, Jamaica (19 professional/17 administrative). Certainly, the staffing "needs" will mushroom when seabed mining is a reality. (Interestingly, the State Department briefed that it is difficult to get top professionals to go to Kingston, Jamaica.)
- ▶ The bottom line of this treaty is the sharing of revenues from businesses with the developing world. Companies' claims to title in the deep sea must first be approved by the Seabed Authority (after payment of an application fee). If approved they must then make annual payments to the Seabed Authority for those rights. In theory, payments are supposed to take the place of Government contributions, and, in the event that they exceed the Administrative budget, are supposed to be shared with Member States by a formula to be devised in the future. (It is interesting to note, however, that already there is an additional \$1.3 million in application fees from industry that have been set aside in a "trust fund" but are not being used to offset the assessments on Member States.)
- ▶ In addition, the International Tribunal in Hamburg established by the Tribunal was budgeted \$5.8 million in 1998 to fund 21 judges. Just imagine the cost when they begin to get a caseload.
- ▶ Although member states can choose binding international arbitration in many kinds of disputes, the Tribunal is ensured business through a compulsory jurisdiction requirement over certain disputes, including seabed mining.
- ▶ The Seabed Authority stands to take in significant sums in the future. Under the royalty scheme businesses will be required to pay the Seabed Authority for oil, gas, and mineral production on the continental shelf (beyond the 200 mile exclusive economic zone of each country) 1% of the revenue generated in year 6 of production, increasing by 1% each year thereafter, with an annual cap of 7%. (At present, this money is paid to the U.S.; if ratified it would be paid to the Seabed Authority and disbursed according to the formula yet to be determined.)
- ▶ The treaty permits plenty of maneuvering for political purposes. Although decision making within the Seabed Authority has been revised since 1982, the United States still is unable to block a decisions under the general voting procedures without the support of two nations within its regional grouping (U.S., U.K., Japan, and Russia). Although the rules for voting on financial matters are different, and the U.S. must join consensus for financial decisions to go forward (including revenue sharing), the Administration has a long record of voting "abstain" in other international organizations in order to let budgets go forward that it does not support.

Convention on the Law of the Sea
Summary of Responses to SFRC Concerns

'Right of Passage is only a small part of the Convention'

- U.S. Navy remains best guarantor of navigational rights, but naval forces are not unlimited
- U.S. challenges to excessive claims are bolstered by the written rule of law
the Convention has had a positive influence in rolling back excessive maritime claims, and its influence will unravel without U.S. participation and leadership
- navigational freedoms are the foundation for all ocean activities regulated by the Convention:
 - ⇒ 12-mile limit placed on size of coastal states' territorial seas
 - ⇒ passage rights guaranteed through strategic chokepoints and territorial seas
 - ⇒ resource production cannot interfere with navigational freedoms
 - ⇒ hydrographic and military surveys in 200-mile Exclusive Economic Zone (EEZ) not subject to coastal state consent
 - ⇒ warships and other public vessels exempt from environmental provisions

'The Convention Creates "A New Economic Order"' – Developing Countries Dominate

- 1994 modification gave Convention a free-market foundation:
 - ⇒ struck production caps, mandatory tech. transfer and \$1 million annual mining fee
 - ⇒ eliminated subsidies for the "Enterprise" (mining arm of the Seabed Authority)
 - ⇒ struck land-based vs. seabed miner discrimination; set market-based caps on subsidies
 - ⇒ protects pioneer investors from the U.S. and other industrialized nations
 - ⇒ U.S. guaranteed seat in perpetuity in Seabed Council and seat new Finance Committee
 - ⇒ U.S. can veto key substantive decisions, including all financial decisions
 - ⇒ U.S. controlling influence in all other decisions provided by new voting procedures
- royalties from deep seabed mining (beyond the continental shelf) can only be distributed if:
 - ⇒ Seabed Authority administrative costs are paid *and* U.S. agrees to distribution plan
- royalties from mineral production on the continental shelf (beyond 200 miles) will be paid to the Seabed Authority *only after* the first five years of production, which according to industry are the most productive
- the revenue sharing provisions were specifically negotiated by industry representatives to parallel the royalty system in place in the U.S. and have been endorsed by the American Petroleum Institute
- U.S. can control collection/distribution of royalties, but only if we join the Convention
- U.S. can control Seabed Authority annual budgets, but only if we join the Convention
- no LDC domination: U.S. voice is commensurate with its economic/political interests
 - ⇒ U.S. can veto key substantive decisions, such as protection of land-based producers
 - ⇒ U.S. and two other industrialized nations can block other substantive decisions, such as adoption of general rules for seabed mining

U.N. Bureaucracy -- International Tribunal for the Law of the Sea (ITLOS)

- ITLOS has a modest budget of \$6.98 million (\$1.75 million U.S. share) and staff, which includes 21 elected judges and 32 permanent staff (12 professional/20 support).
- ITLOS an optional forum, except for disputes regarding deep seabed mining
- private miners *may sue Seabed Authority* in ITLOS -- an option for the private sector unique under international law
- ample alternatives to ITLOS exist for the U.S., including domestic courts, U.S. Navy challenges, bilateral talks and arbitration
- fisheries management in EEZ, military and law enforcement activities, maritime boundary disputes, and UNSC issues are not subject to compulsory dispute settlement

U.N. Bureaucracy -- International Seabed Authority

- the Seabed Authority has a modest budget of \$4.9 million (\$1.2 million U.S. share) and 36 permanent staff (19 professional/17 support)
- the Seabed Authority has no authority over mineral resources on the continental shelf -- only deep seabed mining beyond areas under national jurisdiction
- the Seabed Authority's management discretion is governed by a standard of 'strict necessity' (e.g. no power to set mining production limitations)
- U.S. can veto revenue sharing decisions
- the Seabed Authority has no discretion in reviewing mining applications: a license must be approved, on a first-come, first-served basis, if financing/technological requirements are met

U.N. Bureaucracy -- Continental Shelf Commission (CSC)

- costs of the 21-member CSC are paid by countries represented on the Commission
- the CSC's role is limited to providing non-binding recommendations on the outer limit of the continental shelf beyond 200 NM
- the CSC has no authority over mining decisions of U.S. on continental shelf
- ultimate authority to establish outer limit of continental shelf rests with U.S., not CSC
- the U.S. has the largest and richest continental shelf in the world

Convention on the Law of the Sea
Detailed Responses to Major Concerns Raised by SFRC

Concern: *Right of Passage.* While the Convention's navigational provisions reflect customary practice, the U.S. Navy, not the Treaty, is the best guarantor of preserving U.S. navigational interests. The navigational provisions represent only a small part of the Treaty.

Response:

- the Navy remains the best guarantor of U.S. navigational rights, but we will never have enough forces to challenge all excessive claims
- joining the Convention strengthens U.S. challenges against excessive maritime claims by bolstering our operations with the written rule of law
- customary rules are subject to change and varying interpretation; the Convention's navigational provisions provide clarity, leaving no room for interpretation (particularly those guaranteeing transit rights through strategic chokepoints)
- the Convention has had a positive influence in rolling back excessive maritime claims (*e.g.*, since 1982, 12 nations (most of which claimed 200 nautical mile territorial seas) have amended their excessive claims to conform to the Convention's 12-mile limit); importance of the Convention as "the standard" is bolstered by U.S. participation
- without U.S. participation and leadership, the Convention's navigational provisions (and hence customary practice) will unravel over time; the U.S. must remain engaged to ensure the law of the sea develops in a way that benefits our security and economic interests
- references to navigational freedoms are the foundation for all ocean activities regulated by the Convention; for example:
 - ⇒ the Convention limits the extension of the territorial sea, thereby maximizing sea areas where high seas freedoms of navigation and overflight apply
 - ⇒ the Convention guarantees passage rights through international straits like Hormuz and Malacca, archipelagoes like Indonesia and the Philippines, and foreign territorial seas
 - ⇒ resource rights in the 200 nautical mile exclusive economic zone (EEZ) and the continental shelf, as well as deep seabed mining activities, cannot interfere with navigational freedoms and other non-resource-related high seas freedoms
 - ⇒ the high seas and deep seabed remain open to all nations for marine scientific research
 - ⇒ the basis is provided for hydrographic and military surveys to remain distinct from marine scientific research and thus not subject to coastal state consent in the EEZ
 - ⇒ warships and other public vessels are exempt from the Convention's environmental provisions
 - ⇒ military and law enforcement activities, as well as matters before the UNSC, are not subject to compulsory dispute settlement (without U.S. consent)

Concern: *A New Economic Order*. The anachronistic philosophies of the 1970's relating to the "common heritage of mankind" and the "new economic order" are still dominant in the Convention. An analogy is drawn to the "Moon Treaty."

Response:

- the Convention designates only the deep seabed (beyond the continental shelf) as the "common heritage of mankind;" all other areas of the ocean are not affected
- the "common heritage" principle simply means that the deep seabed is open to use by all in accordance with commonly accepted rules; without such rules, U.S. companies cannot obtain the title to resources or financing necessary to undertake seabed mining
- the 1994 Part XI Agreement gave the Convention the free-market foundation it needed to receive the support of the U.S. and other industrialized nations:
 - ⇒ production limitation provisions eliminated
 - ⇒ discrimination between land-based producers and seabed miners prohibited
 - ⇒ market-oriented restrictions on subsidies incorporated
 - ⇒ privileged status/subsidies for "Enterprise" (mining arm of ISA) eliminated
 - ⇒ \$1 million annual fee eliminated
 - ⇒ pioneer investors from the U.S. and other industrialized nations protected
 - ⇒ mandatory technology transfer provisions eliminated
 - ⇒ U.S. and other industrialized nation representation in the ISA guaranteed (*i.e.*, U.S. guaranteed seat in perpetuity in Council and seat in new Finance Committee if we become a party)
 - ⇒ U.S.-veto over nearly all important substantive decisions, including all financial decisions (*e.g.*, ISA budget, revenue sharing), guaranteed if we become a party
 - ⇒ U.S. controlling influence in all other decisions provided by new voting procedures
- royalties from seabed mining can only be distributed if two conditions are met:
 - ⇒ first, mining revenues must be used to eliminate the need for assessed contributions from member states used to pay ISA's administrative expenses
 - ⇒ second, if a surplus of funds exists after ISA administrative expenses have been paid, it may be distributed only if the U.S. agrees as a member of the Council
- rules for collecting and distributing royalties will be developed by the International Seabed Authority over the next few years; the only way the U.S. can control how royalties are collected and distributed after November 1998 is by becoming a party to the Convention
- the ISA budget is approved by the Council on an annual basis; the only way the U.S. can control the size of the budget after November 1998 is by becoming a party to the Convention
- reference to the "Moon Treaty" is not appropriate, as that Treaty has neither been signed nor ratified by the U.S., and there are no plans to do so

Concern: *Creation of an Extensive U.N. Bureaucracy.* The Convention sets up an extensive U.N. bureaucracy that gives developing countries the ability to block or override U.S. initiatives. The Treaty creates: an International Tribunal to consider disputes under the Treaty; the Seabed Authority to collect and distribute royalties for seabed mining, and review and approve applications for mining in areas beyond territorial waters, with broad authorities over production of minerals; and a Continental Shelf Commission to monitor and discuss mining along continental shelves.

Response:

Decisionmaking -- developing countries' limited influence in the ISA

- the 1994 Part XI Agreement modifies the Convention to provide the U.S. and other industrialized nations a voice in ISA decisionmaking commensurate with their economic and political interests; for example:
 - ⇒ the U.S. is guaranteed a seat in perpetuity in the ISA Council if we join the Convention; the U.S. also has a seat on the newly created Finance Committee
 - ⇒ all financial and budgetary decisions of the ISA, including revenue sharing, must be approved by the Finance Committee or the Council by consensus; this gives the U.S. a veto over such matters if we join the Convention
 - ⇒ decisions to protect land-based producers from the adverse affects of deep seabed mining and to adopt or amend the rules governing the seabed mining regime must be made by consensus; this gives the U.S. a veto over such matters if we join the Convention
 - ⇒ new weighted voting procedures in the Council provide the U.S. and two other select industrialized nations (U.K., Japan or Russia) the ability to block other substantive decisions, such as the adoption of general rules for seabed mining

International Tribunal for the Law of the Sea (ITLOS)

- only disputes regarding the deep seabed mining regime must be referred to ITLOS; for all other disputes under the Convention ITLOS is an optional forum
- ITLOS jurisdiction over seabed mining disputes is unique -- unlike any other international court, private miners have direct standing to sue the ISA
- the U.S. will continue to address maritime issues in a variety of ways, including: U.S. domestic courts (*e.g.*, fisheries enforcement, drug and migrant interdiction), the freedom of navigation program (*e.g.*, excessive maritime claims), bilateral discussions (*e.g.*, maritime boundary delimitations) and arbitration (*e.g.*, disputes concerning interpretation of the Convention)
- matters relating to fisheries management in the EEZ and matters of national concern (*i.e.*, disputes concerning military and law enforcement activities, maritime boundaries and issues before the UNSC) are not subject to compulsory and binding dispute settlement
- ITLOS has a modest budget of \$6.98 million (\$1.75 million U.S. share) and staff, which includes 21 elected judges and 32 permanent staff (12 professional/20 support)

International Seabed Authority (ISA)

- ISA administers seabed mining beyond areas under national jurisdiction (*i.e.*, beyond the continental shelf); the ISA has no authority over mineral resources of the continental shelf
- the 1994 Part XI Agreement limits the authority of the ISA to what is strictly necessary; for example, the power to set production limitations for seabed mining has been eliminated
- revenue sharing decisions must be made by consensus and may thus be vetoed by the U.S.
- applications for mining are considered on a first-come, first-served basis; approval of applications from financially and technically qualified miners is non-discretionary
- the ISA has a modest budget of \$4.9 million (\$1.2 million U.S. share) and 36 permanent staff (19 professional/17 support), only 30 of which are currently filled; the only way the U.S. can guard against inappropriate expansion of the ISA is to join the Convention

Continental Shelf Commission (CSC)

- the authority of the CSC is limited to providing non-binding recommendations to coastal states concerning the outer limit of the continental shelf in areas where the shelf extends beyond 200 nautical miles from the coast; it has no authority over mining decisions of coastal states
- the ultimate authority to establish the outer limit of the continental shelf and develop its resources rests with the coastal States, not the CSC
- the U.S. has the largest and richest continental shelf in the world
- costs and salaries associated with the 21-member CSC are paid by the countries represented on the Commission

Detailed Responses to SFRC Paper Entitled
"Other Interesting Facts About the Law of the Sea Treaty"

Concern (points one and two): Comments about current ISA budget (\$4.9 million) and size of ISA staff (36), and anticipated growth

Response:

- current budget of \$4.9 million (\$1.2 million U.S. share) and staffing (36 permanent staff) is modest by comparison to other international organizations
- by all estimates, seabed mining will not become economically viable, if at all, for at least two decades; ISA budget and staffing should remain relatively constant for the foreseeable future
- current budget and staff are used to fund activities, such as:
 - ⇒ building maintenance and utilities; purchase of equipment, supplies and services
 - ⇒ support of regular meetings of ISA members (e.g., translation, interpretation, etc.)
 - ⇒ register claims of pioneer investors; process applications of private miners (if any)
 - ⇒ develop a mining code necessary to conduct mining activities on the deep seabed
- the best way the U.S. can control the ISA budget and activities is to join the Convention

Concern: Title to seabed minerals must be approved by ISA after payment of an application fee; thereafter annual payments must be made; excess revenues from seabed mining will be shared with member states by a formula to be devised in the future; there is already \$1.3 million set aside in a trust fund that has not been used to offset the assessment of member states

Response:

- approval of mining applications is not within the discretion of the ISA; U.S. applicants that meet the required financial and technical requirements of the Convention will have their applications approved on a first-come, first-served basis
- the original \$1 million annual fee has been eliminated; a modest annual fee will be charged during commercial production, but any amount paid can be credited against payments due to the ISA under the royalty system to be developed in the future
- if the application fee paid to the ISA to claim a mine site exceeds the cost of processing the application, the ISA must refund the difference to the miner
- as a member of the Council and the Finance Committee, the U.S. can veto any decision related to revenue sharing that is contrary to our interests if we join the Convention
- the \$1.3 million that have been set aside in a trust fund came from the \$250K application fees that each pioneer seabed investor paid when they registered their claims with the ISA; these funds will be held in trust by the U.N. until the ISA takes a final decision on their disposition

Concern: Comment about ITLOS budget (\$6.98 million) to fund 21 judges, and anticipated growth when case load increases

Response:

- ITLOS budget is used to pay not only costs associated with the 21 elected judges, but also other items, such as:
 - ⇒ the 32 permanent staff members (12 professional/20 support)
 - ⇒ building maintenance and utilities; purchase of equipment, supplies and services
 - ⇒ of the 21 judges, only the President is full-time; the others are paid for part-time service and when they are hearing cases
- continued U.S. leadership is required to ensure ITLOS budget growth is kept under control
- the U.S. expects the ITLOS budget to remain relatively constant for the foreseeable future; the court has already heard several cases

Concern: ITLOS is ensured business through a compulsory jurisdiction requirement over certain disputes, including deep seabed mining

Response:

- most of the Convention's provisions are subject to compulsory and binding dispute settlement, but ITLOS has compulsory jurisdiction over seabed mining disputes only; jurisdiction over other matters is purely optional
- for all other disputes subject to binding settlement, the forum for the U.S. will be arbitration
- matters relating to fisheries management in the EEZ and matters of national concern (*i.e.*, disputes concerning military and law enforcement activities, maritime boundaries and issues before the UNSC) are not subject to compulsory and binding dispute settlement

Concern: ISA will also take in significant funds from oil, gas and mineral production on the continental shelf beyond the 200 mile EEZ; this money will be paid to the ISA and disbursed according to a formula yet to be determined

Response:

- although U.S. companies (through the USG) will pay royalties to the ISA for mineral production on the continental shelf beyond 200 miles, no revenue sharing is required during the first five years of production, which according to industry are the most productive
- these revenue sharing provisions were specifically negotiated by industry representatives to parallel the royalty system in place in the U.S. and have been endorsed by the American Petroleum Institute
- these funds must be kept separate and distinct from deep seabed mining royalties and may not be used to offset administrative expenses of the ISA
- ISA Council action is required before funds can be distributed under these provisions; the U.S. can therefore block distributions that are contrary to U.S. interests if we join the Convention

- after November 1998, the best way the U.S. can ensure funds are not distributed inconsistent with our interests is to join the Convention

Concern: The U.S. is unable to block a decision under the general voting procedures without the support of two nations within its regional group (U.S., UK, Japan and Russia); although the U.S. must join consensus before financial decisions go forward, the Administration has a long record of voting "abstain" in other international organizations in order to let budgets go forward that it does not support

Response:

- the U.S. can veto key substantive decisions taken by the Council and ISA, including:
 - ⇒ decisions having financial or budgetary implications (including revenue sharing)
 - ⇒ decisions regarding protection of land-based producers
 - ⇒ decisions to adopt amendments to the deep seabed mining regime
- other substantive decisions can be blocked with the support of two other industrialized nations (U.K., Japan and Russia), states with interests similar to our own
- applications for mining are considered on a first-come, first-served basis; approval of applications from financially and technically qualified miners is non-discretionary
- the U.S. has led efforts in various international fora, including the IMO, ITLOS and ISA, to control costs
 - ⇒ the 1998 budget adopted by the ISA in August 1997 was almost \$1 million less than requested
 - ⇒ in November 1997, the IMO General Assembly approved a zero nominal growth budget for the 1998-1999 biennium
 - ⇒ in May 1998, the Meeting of State Parties adopted a significantly pared down budget (over \$1 million less than requested) for ITLOS for 1999